

1 Zachary M. Best, SBN 166035
2 MOORE LAW FIRM, P.C.
3 332 North Second Street
4 San Jose, California 95112
5 Telephone (408) 298-2000
6 Facsimile (408) 298-6046
7 E-mail: service@moorelawfirm.com

5 Attorneys for Plaintiff
Albert Dytch

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

I. SUMMARY

23 1. This is a civil rights action by plaintiff ALBERT DYTCH (“Plaintiff”) for
24 discrimination at the building, structure, facility, complex, property, land, development, and/or
25 surrounding business complex known as:

Kakui Sushi
2060-B Mountain Boulevard
Oakland, CA 94611
(hereafter "the Facility")

1 2. Plaintiff seeks damages, injunctive and declaratory relief, attorney fees and
2 costs, against KAKUI, INC., dba KAKUI SUSHI; NEIL B. GOODHUE, Trustee of the
3 SANDRINGHAM TRUST under Declaration of Trust dated August 4, 1999; DIANE C.
4 GOODHUE, Trustee of the SANDRINGHAM TRUST under Declaration of Trust dated
5 August 4, 1999; LEON R. GERWELL, Successor Trustee of the HENRY L. PERSOGLIO
6 TRUST dated March 10, 2000 (hereinafter collectively referred to as "Defendants"), pursuant
7 to Title III of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.)
8 ("ADA") and related California statutes.

II. JURISDICTION

10 3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1333 for ADA
11 claims.

12 4. Supplemental jurisdiction for claims brought under parallel California law –
13 arising from the same nucleus of operative facts – is predicated on 28 U.S.C. § 1337.

14 || 5. Plaintiff's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

16 6. All actions complained of herein take place within the jurisdiction of the United
17 States District Court, Northern District of California, and venue is invoked pursuant to 28
18 U.S.C. § 1331(b), (c).

IV. PARTIES

20 7. Defendants own, operate, and/or lease the Facility, and consist of a person (or
21 persons), firm, and/or corporation.

22 8. Plaintiff suffers from muscular dystrophy. As a result, he is substantially limited
23 in his ability to walk, has limited dexterity, and must use a wheelchair for mobility.
24 Consequently, Plaintiff is “physically disabled,” as defined by all applicable California and
25 United States laws, and a member of the public whose rights are protected by these laws.

V. FACTS

27 9. The Facility is open to the public, intended for non-residential use, and its
28 operation affects commerce. The Facility is therefore a public accommodation as defined by

1 applicable state and federal laws.

2 10. Plaintiff lives within three miles from the Facility and visited the Facility on or
3 about June 12, 2019 to have lunch. During his visit to the Facility, Plaintiff encountered the
4 following barriers (both physical and intangible) that interfered with, if not outright denied,
5 Plaintiff's ability to use and enjoy the goods, services, privileges and accommodations offered
6 at the Facility:

- 7 a) Plaintiff and his wife were frustrated that they could not sit outside to
8 enjoy the beautiful weather because none of the outdoor tables could
9 accommodate Plaintiff's wheelchair. All of the tables had pedestals with
10 insufficient foot clearances and some of them could not be reached by
11 wheelchair.
- 12 b) Plaintiff and his wife were frustrated that they could not sit at the
13 lowered section of the sushi bar because it was clearly used for storage,
14 a cabinet blocked access to it, and it was not wide enough for two to sit
15 together comfortably.
- 16 c) Plaintiff and his wife sat at the only indoor option, which was one of
17 several four-seat tables with pedestal bases that interfered with
18 Plaintiff's wheelchair footrests. Plaintiff had to sit uncomfortably far
19 from the table, straining his neck, shoulders, and back to reach his food.
20 Because Plaintiff could not pull up close to the table and the path of
21 travel behind Plaintiff's wheelchair was narrow, other patrons and the
22 waiter ran into Plaintiff's wheelchair on three occasions, which left him
23 in fear of being jostled throughout the meal.
- 24 d) The path of travel to the restroom was obstructed by a chair and a
25 barstool, which had to be moved by the waiter for Plaintiff to get by,
26 which was embarrassing.

27 11. The barriers identified in paragraph 10 herein are only those that Plaintiff
28 personally encountered. Plaintiff is presently unaware of other barriers which may in fact exist

1 at the Facility and relate to his disabilities. Plaintiff will seek to amend this Complaint once
2 such additional barriers are identified as it is Plaintiff's intention to have all barriers which
3 exist at the Facility and relate to his disabilities removed to afford him full and equal access.

4 12. Plaintiff was, and continues to be, deterred from visiting the Facility because
5 Plaintiff knows that the Facility's goods, services, facilities, privileges, advantages, and
6 accommodations were and are unavailable to Plaintiff due to Plaintiff's physical disabilities.
7 Plaintiff enjoys the goods and services offered at the Facility, and will return to the Facility
8 once the barriers are removed.

9 13. Defendants knew, or should have known, that these elements and areas of the
10 Facility were inaccessible, violate state and federal law, and interfere with (or deny) access to
11 the physically disabled. Moreover, Defendants have the financial resources to remove these
12 barriers from the Facility (without much difficulty or expense), and make the Facility
13 accessible to the physically disabled. To date, however, Defendants refuse to either remove
14 those barriers or seek an unreasonable hardship exemption to excuse non-compliance.

15 14. At all relevant times, Defendants have possessed and enjoyed sufficient control
16 and authority to modify the Facility to remove impediments to wheelchair access and to
17 comply with the 1991 ADA Accessibility Guidelines and/or the 2010 ADA Standards for
18 Accessible Design. Defendants have not removed such impediments and have not modified the
19 Facility to conform to accessibility standards. Defendants have intentionally maintained the
20 Facility in its current condition and have intentionally refrained from altering the Facility so
21 that it complies with the accessibility standards.

22 15. Plaintiff further alleges that the (continued) presence of barriers at the Facility is
23 so obvious as to establish Defendants' discriminatory intent. On information and belief,
24 Plaintiff avers that evidence of this discriminatory intent includes Defendants' refusal to adhere
25 to relevant building standards; disregard for the building plans and permits issued for the
26 Facility; conscientious decision to maintain the architectural layout (as it currently exists) at the
27 Facility; decision not to remove barriers from the Facility; and allowance that Defendants'
28 property continues to exist in its non-compliant state. Plaintiff further alleges, on information

1 and belief, that the Facility is not in the midst of a remodel, and that the barriers present at the
2 Facility are not isolated or temporary interruptions in access due to maintenance or repairs.

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4 **VI. FIRST CLAIM**

5 **Americans with Disabilities Act of 1990**

6 Denial of “Full and Equal” Enjoyment and Use

7 16. Plaintiff re-pleads and incorporates by reference the allegations contained in
8 each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

9 17. Title III of the ADA holds as a “general rule” that no individual shall be
10 discriminated against on the basis of disability in the full and equal enjoyment (or use) of
11 goods, services, facilities, privileges, and accommodations offered by any person who owns,
12 operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

13 18. Defendants discriminated against Plaintiff by denying Plaintiff “full and equal
14 enjoyment” and use of the goods, services, facilities, privileges and accommodations of the
15 Facility during each visit and each incident of deterrence.

16 Failure to Remove Architectural Barriers in an Existing Facility

17 19. The ADA specifically prohibits failing to remove architectural barriers, which
18 are structural in nature, in existing facilities where such removal is readily achievable. 42
19 U.S.C. § 12182(b)(2)(A)(iv).

20 20. When an entity can demonstrate that removal of a barrier is not readily
21 achievable, a failure to make goods, services, facilities, or accommodations available through
22 alternative methods is also specifically prohibited if these methods are readily achievable. *Id.*
23 § 12182(b)(2)(A)(v).

24 21. Here, Plaintiff alleges that Defendants can easily remove the architectural
25 barriers at the Facility without much difficulty or expense, and that Defendants violated the
26 ADA by failing to remove those barriers, when it was readily achievable to do so.

27 22. In the alternative, if it was not “readily achievable” for Defendants to remove
28 the Facility’s barriers, then Defendants violated the ADA by failing to make the required

1 services available through alternative methods, which are readily achievable.

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4 Failure to Design and Construct an Accessible Facility

5 23. Plaintiff alleges on information and belief that the Facility was designed and
6 constructed (or both) after January 26, 1993 – independently triggering access requirements
7 under Title III of the ADA.

8 24. The ADA also prohibits designing and constructing facilities for first occupancy
9 after January 26, 1993, that aren't readily accessible to, and usable by, individuals with
10 disabilities when it was structurally practicable to do so. 42 U.S.C. § 12183(a)(1).

11 25. Here, Defendants violated the ADA by designing and constructing (or both) the
12 Facility in a manner that was not readily accessible to the physically disabled public –
13 including Plaintiff – when it was structurally practical to do so.¹

14 Failure to Make an Altered Facility Accessible

15 26. Plaintiff alleges on information and belief that the Facility was modified after
16 January 26, 1993, independently triggering access requirements under the ADA.

17 27. The ADA also requires that facilities altered in a manner that affects (or could
18 affect) its usability must be made readily accessible to individuals with disabilities to the
19 maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering an area that contains a facility's
20 primary function also requires making the paths of travel, bathrooms, telephones, and drinking
21 fountains serving that area accessible to the maximum extent feasible. Id.

22 28. Here, Defendants altered the Facility in a manner that violated the ADA and
23 was not readily accessible to the physically disabled public – including Plaintiff – to the
24 maximum extent feasible.

25 Failure to Modify Existing Policies and Procedures

26 29. The ADA also requires reasonable modifications in policies, practices, or
27 procedures, when necessary to afford such goods, services, facilities, or accommodations to

28 ¹ Nothing within this Complaint should be construed as an allegation that Plaintiff is bringing this action as a
private attorney general under either state or federal statutes.

1 individuals with disabilities, unless the entity can demonstrate that making such modifications
2 would fundamentally alter their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

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1 30. Here, Defendants violated the ADA by failing to make reasonable modifications
2 in policies, practices, or procedures at the Facility, when these modifications were necessary to
3 afford (and would not fundamentally alter the nature of) these goods, services, facilities, or
4 accommodations.

Failure to Maintain Accessible Features

6 31. Defendants additionally violated the ADA by failing to maintain in operable
7 working condition those features of the Facility that are required to be readily accessible to and
8 usable by persons with disabilities.

9 32. Such failure by Defendants to maintain the Facility in an accessible condition
10 was not an isolated or temporary interruption in service or access due to maintenance or
11 repairs.

12 33. Plaintiff seeks all relief available under the ADA (i.e., injunctive relief, attorney
13 fees, costs, legal expense) for these aforementioned violations. 42 U.S.C. § 12205.

VII. SECOND CLAIM

Unruh Act

16 34. Plaintiff re-pleads and incorporates by reference the allegations contained in
17 each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

18 35. California Civil Code § 51 states, in part, that: All persons within the
19 jurisdiction of this state are entitled to the full and equal accommodations, advantages,
20 facilities, privileges, or services in all business establishments of every kind whatsoever.

21 36. California Civil Code § 51.5 also states, in part that: No business establishment
22 of any kind whatsoever shall discriminate against any person in this state because of the
23 disability of the person.

24 37. California Civil Code § 51(f) specifically incorporates (by reference) an
25 individual's rights under the ADA into the Unruh Act.

26 38. Defendants' aforementioned acts and omissions denied the physically disabled
27 public – including Plaintiff – full and equal accommodations, advantages, facilities, privileges
28 and services in a business establishment (because of their physical disability).

1 39. These acts and omissions (including the ones that violate the ADA) denied,
2 aided or incited a denial, or discriminated against Plaintiff by violating the Unruh Act.

3 40. Plaintiff was damaged by Defendants' wrongful conduct, and seeks statutory
4 minimum damages of \$4,000 for each offense.

5 41. Plaintiff also seeks to enjoin Defendants from violating the Unruh Act (and
6 ADA), and recover reasonable attorneys' fees and costs incurred under California Civil Code
7 § 52(a).

VIII. THIRD CLAIM

Denial of Full and Equal Access to Public Facilities

10 42. Plaintiff re-pleads and incorporates by reference the allegations contained in
11 each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

12 43. Health and Safety Code § 19955(a) states, in part, that: California public
13 accommodations or facilities (built with private funds) shall adhere to the provisions of
14 Government Code § 4450.

15 44. Health and Safety Code § 19959 states, in part, that: Every existing (non-
16 exempt) public accommodation constructed prior to July 1, 1970, which is altered or
17 structurally repaired, is required to comply with this chapter.

18 45. Plaintiff alleges the Facility is a public accommodation constructed, altered, or
19 repaired in a manner that violates Part 5.5 of the Health and Safety Code or Government Code
20 § 4450 (or both), and that the Facility was not exempt under Health and Safety Code § 19956.

21 46. Defendants' non-compliance with these requirements at the Facility aggrieved
22 (or potentially aggrieved) Plaintiff and other persons with physical disabilities. Accordingly,
23 Plaintiff seeks injunctive relief and attorney fees pursuant to Health and Safety Code § 19953.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.
2. Statutory minimum damages under section 52(a) of the California Civil Code according to proof.

- 1 3. Attorneys' fees, litigation expenses, and costs of suit.²
- 2 4. Interest at the legal rate from the date of the filing of this action.
- 3 5. For such other and further relief as the Court deems proper.

4 Dated: 08/01/2019

5 MOORE LAW FIRM, P.C.

6 /s/ Zachary M. Best

7 Zachary M. Best
8 Attorneys for Plaintiff
9 Albert Dytch

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² This includes attorneys' fees under California Code of Civil Procedure § 1021.5.

VERIFICATION

I, ALBERT DYTCH, am the plaintiff in the above-entitled action. I have read the foregoing Complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

Dated: 08/01/2019

/s/ Albert Dytch
Albert Dytch

I attest that the original signature of the person whose electronic signature is shown above is maintained by me, and that his concurrence in the filing of this document and attribution of his signature was obtained.

/s/ Zachary M. Best
Zachary M. Best, Attorney for
Plaintiff, Albert Dytch